Leslae J. E. Dalpiaz, P.C.
Attorney at Law

EXHIBIT 5
DATE 3-19-09
SB 371

March 17, 2009

Before The

Senate Business, Labor and Economic Development Committee

Senate Bill 371

Testimony of:
Leslae J. E. Dalpiaz
Attorney at Law
PO Box 8291
Missoula, MT 59807

Mr. Chairman, and members of the Committee.

My name is Leslae Dalpiaz and I am the attorney who represented Maril BeVan in the workers' compensation case BeVan vs. Liberty Northwest that is one of the real life stories that led to this legislation. Like the employers who are chiming in on this issue, I would like to remind all of you that I too am a small business person as is my husband, and that we provide workers' compensation insurance through the Montana State Fund as well as health insurance for our employees. I am just as representative as a Montanan and business person in this state as a sponsor of this legislation or any of its supporters. For that reason, I am very fearful that the proposed legislation will not help us but will, in fact, cost us thousands of dollars and generate more work for our over burdened courts.

The first thing that needs to be remembered is that very few cases that arise in the workers' compensation venue deal with course and scope and all of them are very fact specific. In this instance, while there was an outcry with regards to the facts and what Ms. BeVan was doing on her break, the real issue came down to the fact that she was on a paid break and had permission to leave her work site.

What needs to be remembered is that workers' compensation premiums provide an excellent value to both the employer and the employee. Furthermore, if an employer has workers' compensation coverage or an event is covered by workers' compensation coverage, that employee is prevented from suing the employer outright. The workers' compensation insurer handles all costs of handling a claim including potential litigation, leaving the employer to focus on the day to day activities of their business.

However, it is a trial lawyers dream to be able to circumvent the workers' compensation system and to sue an employer directly as the potential for a greater financial recovery is expediential. This bill and how it is drafted has the potential to expose employers to a far greater degree than any type of claim within the work comp system. This is not a common sense bill, it is a potential landmine for employers and business owners and to be told otherwise is simply to be sold a bill of goods.

A few years ago a very intoxicated young woman was killed after being allowed to leave an employer sponsored Christmas party. Because she was single without any beneficiaries the extent of the liability for a workers' compensation claim was $3,500.00. However, if her family was able to sue her employer as this bill would now allow, they would have received hundreds of thousands of dollars. Quite frankly, that justifies logic no more or no less than my BeVan case.

There is always going to be cases that make us shake our heads, but those are the exceptions, not the rule. I would ask that you carefully review Senate Bill 371 prior to voting in favor of it and ask yourself if you want to be responsible for crafting legislation that will seriously hurt employees in order to eliminate a single isolated case that makes you shake your head.

Sincerely,

Leslae J.E. Dalpiaz

LJE/mc

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ATTORNEYS AT LAW

March 18, 2009

Montana House of Representatives
Business and Labor Committee
P.O. Box 200400
Helena, MT 59620-0400

Re: Senate Bill 371

Dear Chairman Wilson and Members of the House Business and Labor Committee:

I write to you in opposition to Senate Bill 371.

My name is Sydney E. McKenna and I practice law in Missoula, Montana. Part of my practice includes representing Montana workers who suffer occupational injuries. My associate, Justin Starin and I represented Curtis Michalak in his claim for workers' compensation coverage and benefits against Liberty Northwest, the workers' compensation insurance company that is promoting SB371. Since the Michalak case is being touted as one of the reasons for SB 371, I wanted to give you the perspective of the attorney who handled the case. First, we attempted on more than one occasion to settle this case prior to trial, but my overtures were to no avail as Liberty Northwest would not entertain settlement discussions at any level. In hindsight, I am convinced that Liberty intended to use this case as a catalyst to get the law changed by waving the "wave runner" case in front of you, hoping for a negative emotional reaction to how my client was injured. There were many facts established in the case besides a wave runner ride and, if you are moved to change the law because of this case, then I trust you will read the decision by the Workers' Compensation Court and the Montana Supreme Court; copies are attached. Even after we won the case at the Workers' Compensation Court trial and the appeal to the Montana Supreme Court, we had to file another case in front of the Workers' Compensation Court in order to get Liberty to pay the benefits that the courts decided were owed. In the meantime, my client, a former laborer, who sustained a broken back on the wave runner, went for several years without a dime of benefits. However, rather than sit around and wait for Liberty, he obtained a two year degree in Electronics Technology and achieved a 3.77 GPA.

If you read the attached cases, you will see that the Montana Supreme Court affirmed the Workers' Compensation Court's decision because the Workers' Compensation Court merely applied long standing precedent, known as the four point test that has been in place since 1984, to find that Mr. Michalak was in the course and scope of his employment. If we had not been able to prove all four parts of the test, we

would have lost the case. However, we proved all four parts of the test. It was no surprise to us that we prevailed in court, and it should not have been a surprise to Liberty either. However, the language in the preamble to this bill would make it seem as if this case illustrates how the courts are unpredictable. The preamble is simply disingenuous. If it is predictability that we are after, then don't change the course and scope test.

Course and scope cases are rare. I've lost some of the few course and scope cases I have handled, including *Hampson v. Liberty Northwest Insurance Corp.*, 2002 MTWCC 57 (Nov. 18, 2002), a case involving a traveling nurse who was in a car accident while traveling, but whose claim Liberty denied. The denial was upheld by the Workers' Compensation Court at trial because we could not meet the course and scope criteria. Jerry Keck, Administrator of the Employment Relations Division, provided independent testimony in front of the Senate committee that looked at this issue and his testimony demonstrated how rare these kinds of cases are. Mr. Keck said that in the year 2006, for instance, there were 32,903 reported claims but only 419 of those involved insurer denials for course and scope. Out of the 419 cases that were denied, only 62 were paid/settled. The few claimants making course and scope claims are not winning the majority of them.

At the Senate committee hearing, insurers outnumbered the opponents of this bill by a large margin and, while a few employers stood in favor of it, I have to wonder why they would do so. If the employers are not covered by workers' compensation, then they may be exposed to lawsuits for injuries. Let me provide an example. A prestigious accounting firm hosts a Christmas party and provides alcohol but not transportation. A young associate leaves the party and drives drunk, crashes and dies. You can bet that the accounting firm would seek coverage under its workers' compensation insurance. Under that insurance, if the young woman died without a husband or children, her claim would be worth funeral expenses and $3000 to her parents. Under a wrongful death, her claim would include her lifetime earnings. Why would that employer, or any employer, support excluding workers' compensation coverage that may shield it from expensive lawsuits?

Finally, I do not understand why some of the Senators in support of this bill believe this should be rushed through. The Labor Management Council has agreed to study this issue and we should let them. At the Senate Hearing, Senator Balyeat criticized the council for not jumping on this issue right after the Michalak case was decided by the Montana Supreme Court. What Senator Balyeat fails to appreciate is that the Michalak decision was not a surprise.

In closing, please do not respond to the insurers' cry that the sky is falling. It is not. If you change the law, then you will be creating litigation in the workers' compensation system and outside the system.

Thank you for your consideration of my testimony and thank you for all your hard work this session.

Sincerely yours,

Sydney E. McKenna

SEM/cah
Enclosures

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 14

WCC No. 2006-1641

CURTIS M. MICHALAK

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner attended a company picnic hosted by his employer at the employer's lake home and was injured while riding a wave runner on the water. Respondent denied liability.

Held: Section 39-71-118, MCA, which defines "employee" does not preclude Petitioner from receiving benefits because he was acting within the course and scope of his employment at the time of his injury even though he was engaged in a recreational activity.

Topics:

Employment: Course and Scope: Generally. Where a company picnic occurred at the home of the company president, the company inquired about the employees' attendance by placing a notice of the picnic with the employee's pay stubs, posting a written notice, circulating a sign-up sheet, and by asking for a headcount, the activity was undertaken at the employer's request and thus the first factor of the "course and scope" test is satisfied.

Employment: Course and Scope: Generally. Where Petitioner felt compelled to attend the company picnic because his supervisor requested he oversee the wave runners at the picnic, vendors were invited to attend the

picnic, and the company president addressed the employees, the employer either directly or indirectly compelled the employee's attendance at the activity and thus the second factor of the "course and scope" test is satisfied.

Employment: Course and Scope: Generally. Where the company picnic was hosted by the company president, a company secretary organized the picnic, shopped for supplies and assisted with the dinner, the company paid for the supplies and rented the wave runners, the company representatives believed the company took a deduction for the expenses it incurred for the picnic and used its property at the picnic, the employer controlled or participated in the activity and thus the third factor of the "course and scope" test is satisfied.

Employment: Course and Scope: Generally. Where the company invited its employees and vendors to the company picnic, used the picnic as a forum for its officers to address the employees, and the company president agreed the picnic was good for the company and promoted good relations, the company and its employees mutually benefitted from the activities and thus the fourth factor of the "course and scope" test is satisfied.

Employment: Course and Scope: Recreational Activities. The Court concludes that an employee injured while riding a wave runner at a company picnic was acting in the course and scope of his employment where the employee attended the picnic at the request of his employer, was directly or indirectly compelled to attend, the employer controlled or participated in the picnic, and both the employer and employee mutually benefitted from the picnic.

¶ 1 The trial in this matter was held on September 28, 2006, in Missoula, Montana. Petitioner Curtis M. Michalak was present and represented by Sydney E. McKenna. Respondent Liberty Northwest Insurance Corporation was represented by Larry W. Jones.

¶ 2 Exhibits: Exhibits 1 through 19 and 21 through 29 were admitted without objection. Exhibit 20 was withdrawn.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, John Felton, Denise Sand, Shawn Skinner, Steve Talley, Lynn Kurtz, Tim Yoder, Alfred Dion, and Kirt Weishaar were taken and submitted to the Court. Petitioner was sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues of law:

¶ 4a Is Liberty liable for the claim?[1]

FINDINGS OF FACT

¶ 5 Petitioner was a credible witness and the Court finds his testimony at trial credible.

¶ 6 On July 23, 2005, Petitioner attended a company picnic at the lakeside home of John Felton (Felton), president and owner of Felco Industries, Ltd. (Felco).[2]

¶ 7 Felco rented wave runners for the use and enjoyment of picnic attendees. While Petitioner was riding a wave runner, he was seriously injured.[3]

¶ 8 Petitioner's injuries included closed fractures of the L2, L3, and L4 vertebrae that required surgical fusion.[4]

¶ 9 At the time of the accident, Respondent provided workers' compensation insurance to Felco, which sponsored the picnic and employed Petitioner.[5]

¶ 10 Petitioner reported his injuries to his employer who then completed an Accident Reporting Form. Petitioner filed a formal First Report of Injury on January 12, 2006.[6]

¶ 11 Respondent denied liability for the claim and has not paid any of Petitioner's medical expenses or other benefits.[7]

¶ 12 Petitioner was not paid to travel to and from the company picnic, was not reimbursed for his time at the picnic, and was not reimbursed for his transportation expenses.[8]

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[1] Pretrial Order at 2.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Michalak Dep. 23:19 - 24:3.

¶ 13 Felco is located in Missoula, Montana. It fabricates or manufactures attachments for heavy equipment. Petitioner was hired as a welder for Felco.[9]

¶ 14 The company picnic is a tradition and has occurred annually each summer since 1980 at the lake house of Felton.[10] Steve Talley (Talley), a supervisor for Felco testified, "The tradition with the company picnic is every year at John's lake house we had a party with horseshoes and Waverunners and boating. . . . And we get together and have food and have a good time with our families."[11]

¶ 15 The company picnic was held on July 23, 2005. Denise Sand (Sand), a secretary at Felco, stated that in 2005, just as she had in the past, she helped organize the company picnic, shopped for supplies, purchased supplies with a Felco credit card, set up the company picnic, and assisted with the dinner. Sand said that she placed notice of the picnic in the employee pay stubs and asked for a head count.[12]

¶ 16 Sand also testified regarding notice of the company picnic:

> I usually just make out a few copies and put it out in the plant, and it's mainly for Tim that runs the . . . horseshoe contest, just so he can have an idea of how many are going to play. And I like to know how many kids so I have enough hot dogs, kid food, pop, water, ice cream for the kids.[13]

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[9] Trial Test.; Talley Dep. 5:23 - 6:2, 6:15-6:24.

[10] Felton Dep. 5:24 - 6:7; Talley Dep. 7:22 - 8:9.

[11] Talley Dep. 7:24 - 8:5.

[12] Sand Dep. 8:12 - 12:22; Ex. 19; Ex. 22.

[13] Sand Dep. 8:19 - 9:2.

The notice Sand posted at work read:

2005 SUMMER PICNIC
SATURDAY, JULY 23, 2005

> Requesting a head count (food prep) for the picnic that is in the very near future; likely 2 WEEKS!!!!! Please mark down how many will participate in horseshoes and attending the picnic (FRIENDS, FAMILY AND VENDORS)!!!! Return to Deni ASAP!
>
> HORSESHOES ADULTS KIDS[14]

¶ 17 Petitioner felt compelled to attend the picnic.[15] At trial Petitioner testified that although he was not required to attend the picnic, he nonetheless felt compelled to attend because he did not want to dishonor Felton and the company and because an initial head count had been taken.[16]

¶ 18 Felco paid for the picnic. Sand stated that Felco paid for the supplies. She also testified:

> **Q. Did you use a credit card to purchase picnic supplies at Costco?**
>
> A. Yes.
>
> **Q. Do you have authority to sign the card?**
>
> A. Yes.
>
> **Q. In whose name is the card?**
>
> A. John Felton. It's Felco Industries.[17]

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[14] Ex. 19.

[15] Trial Test.

[16] *Id.*

[17] Sand Dep. 11:16-23.

¶ 19 Both Felton and Sand believed Felco took a deduction for the expenses it incurred for the picnic.[18]

¶ 20 In addition to its employees, Felco invited vendors to the picnic.[19]

¶ 21 The company picnic mutually benefitted Felco and Felco's employees.[20] On this point, Shawn Skinner (Skinner) testified:

> **Q. I think that it's been pretty much stipulated and agreed that the company picnic would be a mutual benefit for the company and the employees. Would you agree with that?**
>
> A. I'd say yes.[21]

¶ 22 Felton's testimony corroborated Skinner's assessment. On the subject of his company benefitting from the company picnic, he testified:

> **Q. Do you believe that the company picnic has been good for your company?**
>
> A. I think yes. I think anything like that is. Somebody that doesn't have anything like that is missing the boat.
>
> **Q. It promotes - -**
>
> A. Good relations. . . .[22]

¶ 23 During the picnic, Felco hosts an annual horseshoe competition and honors the winner by placing his or her name on a plaque displayed at the Felco headquarters.[23]

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[18] Sand Dep. 13:3-5; Felton Dep. 7:11-14.

[19] Felton Dep. 7:21-8:1.

[20] Skinner Dep. 8:20-24; Felton Dep. 12:8-12.

[21] Skinner Dep. 8:20-24.

[22] Felton Dep. 12:8-12.

[23] Yoder Dep. 15:9-10; Weishaar Dep. 11:10-18; Felton Dep. 20:13-19.

¶ 24 Felco uses its property at the picnic. A grill made by Felco and stored at Felco was used at the picnic.[24]

¶ 25 Felco used the picnic as a forum for its president to address Felco employees and vendors. At the 2005 picnic, Felton addressed those in attendance and reported as to how the company was performing and thanked his employees for their support.[25]

¶ 26 Among the entertainment and recreation items provided by Felco at the picnic were rented wave runners.[26] Petitioner was assigned the duty of overseeing the wave runners. Felton had asked Talley, Petitioner's supervisor, to oversee the wave runners and Talley, in turn, delegated this responsibility to Petitioner because he knew he would have other responsibilities at the picnic.[27]

¶ 27 Talley testified that Felton took the safety of the wave runners seriously and watched them like a hawk.[28] Talley's responsibility for the wave runners included instructing users regarding safety procedures.[29]

¶ 28 Before his injury, Petitioner oversaw the wave runners. Talley observed Petitioner checking the wave runners, testifying: "I believe he might have been checking to see if the oils were okay and the fuel."[30] Talley also testified that Petitioner had been instructed by the person who had rented the wave runners as to the safe operation of them.[31]

¶ 29 Petitioner's testimony is consistent with Talley's. Approximately a week before the picnic, Talley asked Petitioner to assist with the supervision of the wave runners.[32] Specifically, Petitioner testified:

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[24] Talley Dep. 28:22 - 29:4

[25] Yoder Dep. 10:4-21.

[26] Sand Dep. 21:8-11.

[27] Talley Dep. 16:19 - 19:1; *see also* 36:13-19.

[28] *Id.* at 33:17 - 34:4.

[29] *Id.* at 17:8-12.

[30] *Id.* at 20:7-8.

[31] *Id.* at 40:4-14.

[32] Michalak Dep 25:4-8.

> Steve Talley is my foreman. He requested that I help do this because the previous year there was several complaints, and the only way John [Felton] would rent them is if there was a safety supervisor and a person overseeing the wave runners.[33]

¶ 30 Petitioner further testified regarding the specific tasks Talley assigned to him as it pertained to the overseeing of the wave runners. Specifically, Petitioner testified that he was instructed to help pick up the wave runners, supervise, give safety instructions, monitor the fuel and oil levels, provide instructions on how to ride them, and enforce time limits on their operation.[34] At one point, during the performance of his duties, Petitioner elected to take a turn on one of the wave runners himself because one was available. [35]

¶ 31 While riding one of the wave runners, Petitioner sustained the injuries that are the subject of this action. Petitioner's recollection as to the specifics of how he was injured is vague because of his injuries.[36]

¶ 32 Tim Yoder (Yoder), Felton's nephew who was assisting with the supervision of the wave runners, testified that he saw Petitioner riding the wave runner into the shore and that he looked sore or hurt. Yoder further testified that he noticed blood on the wave runner as Petitioner was getting off of it.[37] Another employee also observed that Petitioner was in pain.[38]

¶ 33 Sand noticed Petitioner was lying on the couch in Felton's basement at the picnic and Petitioner said he had a headache.[39] Sand retrieved a pain reliever for Petitioner.[40]

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[33] *Id.* at 24:21-25.

[34] *Id.* at 25:9-18.

[35] *Id.* at 10:11 - 11:11.

[36] *Id.* at 28:19-22.

[37] Yoder Dep. 13:1-15.

[38] Weishaar Dep. 18:14-21.

[39] Sand Dep. 13:23 - 14:10.

[40] *Id.* at 14:19-23.

¶ 34 After the wave runner accident, Petitioner drove home and could not move the next day.[41] His neighbor, Lynn Kurtz (Kurtz), drove him to the hospital where he was diagnosed with a broken back that eventually required surgical fusion.[42]

CONCLUSIONS OF LAW

¶ 35 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[43]

¶ 36 This Court has jurisdiction over this matter pursuant to § 39-71-2905, MCA.

¶ 37 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[44]

¶ 38 This Court uses the "course and scope" test to determine whether a worker's injury was sustained in the employment relationship.[45] In *Courser v. Darby School Dist. No. 1*, the Montana Supreme Court wrote:

> Controlling factors repeatedly relied upon to determine a work-related injury include: (1) whether the activity was undertaken at the employer's request; (2) whether employer, either directly or indirectly, compelled employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; and (4) whether both employer and employee mutually benefitted from the activity. The presence or absence of each factor, may or may not be determinative and the significance of each factor must be considered in the totality of all attendant circumstances.[46]

¶ 39 In 1993, the Legislature amended the definition of employee to preclude recreational activities from the employment relationship. Specifically, this section provided that the definition of "employee" does not include a person who is:

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[41] Michalak Dep. 30:14-19; 45:20 - 46:21.

[42] Kurtz Dep. 7:19 - 8:18.

[43] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[44] *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

[45] *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 16-17, 692 P.2d 417, 419.

[46] *Id., citing Shannon v. St. Louis Bd. of Educ.*, 577 S.W.2d 949, 951-52 (1979).

(a) participating in recreational activity and who at the time is relieved of and is not performing prescribed duties, regardless of whether the person is using, by discount or otherwise, a pass, ticket, permit, device, or other emolument of employment . . . .[47]

¶ 40 In *Connery v. Liberty Northwest Ins. Corp.,* however, the Montana Supreme Court held that § 39-71-118(2)(a), MCA, does not preclude the use of the "course and scope" test articulated in *Courser.*[48] In fact, the Supreme Court specifically held that "prescribed duties" as used in § 39-71-118, MCA, can only be understood using the "course and scope" test.[49] Connery was a ski instructor at a ski resort.[50] One day, she reported to work at 8:45 a.m. and attended a ski instructor meeting at 9:15 a.m.[51] At approximately 9:45 a.m., her employer assigned Connery a private ski lesson that was to begin at 11:00 a.m.[52] In the mean time, Connery and another ski instructor, Roy, skied a few runs.[53] During one run Connery waited for Roy at the base of a ski lift.[54] Roy was unable to stop and collided with Connery.[55] Connery suffered a severe fracture of her leg.[56] The collision happened at approximately 10:35 a.m., twenty-five minutes before Connery's private lesson.[57] Connery

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[47] § 39-71-118(2)(a), MCA (2005).

[48] *Connery v. Liberty Northwest Ins. Corp.*, 280 Mont. 115, 118-19, 929 P.2d 222, 225 (1996).

[49] *Id.* at 119, 929 P.2d at 225.

[50] *Id.* at 116, 929 P.2d at 223.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 117, 929 P.2d at 223.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 117, 929 P.2d 223-24.

filed a workers' compensation claim.[58] The employer's insurer denied Connery coverage.[59] The Workers' Compensation Court ruled in favor of Connery and the insurer appealed.[60]

¶41 On appeal, the insurer contended that the Workers' Compensation Court erred when it applied the "course and scope" test.[61] The Montana Supreme Court affirmed the Workers' Compensation Court and, in doing so, articulated a two-part analysis of § 39-71-118, MCA, which includes the "course and scope" test.[62] First, a court must determine whether the worker was participating in a recreational activity.[63] Second, a court must determine whether the worker was performing prescribed duties.[64] Regarding the second part, the Supreme Court applied the "course and scope" test.[65] The Supreme Court wrote: "[W]e hold that the "prescribed duties" prong of § 39-71-118(2)(a), MCA, can only be reasonably applied based on a traditional course and scope of employment analysis."[66] After applying the "course and scope" test, the Supreme Court found that Connery was injured in the course and scope of her employment.[67] Applying the same analysis, this Court reaches a similar conclusion.

COURSE AND SCOPE ANALYSIS

Was the activity undertaken at Felco's request?

¶42 The company picnic is a tradition at Felco and has occurred annually in the summer since 1980 at the home of Felco's president. Sand, Felco's secretary, inquired about the employees' attendance at the picnic by placing a notice of the picnic with the employees' pay stubs, by posting a written notice, by circulating a sign-up sheet, and by asking for a

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[58] *Id.* at 117, 929 P.2d 224.

[59] *Id.*

[60] *Id.* at 118, 929 P.2d at 224.

[61] *Id.* at 119, 929 P.2d at 225.

[62] *Id.*

[63] *Id.* at 118, 929 P.2d at 224-25.

[64] *Id.* at 118-19, 929 P.2d 225.

[65] *Id.* at 119, 929 P.2d 225.

[66] *Id.*

[67] *Id.* at 122, 929 P.2d at 227.

head count. This Court, therefore, concludes that the activity was undertaken at Felco's request.

Did Felco either directly or indirectly compel Petitioners' attendance at the picnic?

¶ 43 Petitioner testified at trial that he felt compelled to attend the picnic because his supervisor, Talley, requested that Petitioner oversee the wave runners. Petitioner accepted the duty of overseeing the wave runners. He had knowledge of the wave runner rules he learned from the year before. Vendors were invited to the picnic and Felco's president addressed the employees at the picnic. Whether attendance was expressly mandatory, when an employee is specifically requested by a supervisor to attend an event for the purpose of performing duties such as overseeing an activity at the event, the Court must conclude that, at a minimum, Felco indirectly compelled Petitioner's attendance at the picnic.

Did Felco control or participate in the activity?

¶ 44 The company picnic was hosted by the president of Felco. A secretary of Felco organized the picnic, shopped for supplies, and assisted with the company dinner. Felco paid for the supplies, including the food, beverages, and entertainment. Felco rented the wave runners. Both Felton and Sand believed it claimed a deduction for the expenses it incurred for the picnic and no testimony contradicted this belief. Felco used its property at the picnic, e.g., the Felco grill. Through the use of employees, including the Petitioner, Felco regulated and oversaw the use of the wave runners. The Court concludes that Felco controlled and participated in the activities.

Did Felco and its employees mutually benefit from the activities?

¶ 45 Felco invited its employees and vendors to the picnic. Felco used the picnic as a forum for the officers to address the employees. Felco's president made a speech at the picnic. On this point, Skinner, Felco's general manager, agreed that the company picnic would be a mutual benefit for the company and the employees. Moreover, Felton agreed that the company picnic has been good for his company and promoted good relations. Accordingly, this Court concludes that Felco and its employees mutually benefitted from the activities.

¶ 46 Having met all four factors of the "course and scope" test set out in *Courser* to this Court's satisfaction, this Court concludes that although Petitioner was participating in a recreational activity (riding a wave runner at a company picnic), Petitioner had not been relieved of his prescribed duties as set forth in § 39-71-118, MCA, and therefore, he was acting within the course and scope of his employment.

JUDGMENT

¶ 47 Petitioner was acting within the course and scope of his employment when he was injured while riding a wave runner at the 2005 Felco company picnic.

¶ 48 Respondent is liable for Petitioner's workers' compensation claim.

¶ 49 This JUDGMENT is certified as final for purposes of appeal.

¶ 50 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 22nd day of March, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Sydney E. McKenna
Larry W. Jones
Submitted: September 28, 2006

DA 07-0208

IN THE SUPREME COURT OF THE STATE OF MONTANA

2008 MT 3

CURTIS M. MICHALAK,

Petitioner and Appellee,

v.

LIBERTY NORTHWEST INSURANCE CORPORATION,

Respondent/Insurer and Appellant.

APPEAL FROM: The Workers' Compensation Court,
Cause No. WCC 2006-1641,
Honorable James Jeremiah Shea, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Larry W. Jones, Law Offices of Larry W. Jones, Missoula, Montana

For Appellee:

Sydney E. McKenna and Justin Starin, Tornabene & McKenna, PLLC, Missoula, Montana

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Submitted on Briefs: November 28, 2007

Decided: January 3, 2008

Filed:

Clerk

Justice W. William Leaphart delivered the Opinion of the Court.

¶1 Liberty Northwest Insurance Corporation (Liberty) appeals from the judgment of the Workers' Compensation Court (WCC). We affirm.

¶2 We restate the issues as follows:

¶3 Did the WCC err when it concluded that Michalak's injury occurred during the course and scope of his employment?

¶4 Did Michalak abandon his employment by participating in reckless behavior?

BACKGROUND

¶5 On July 23, 2005, Curtis M. Michalak (Michalak) suffered an injury while riding a wave runner at his employer's annual company picnic at Flathead Lake. At the time of his injury, Michalak worked for Felco Industries, Ltd. (Felco) in Missoula, Montana, and Liberty provided Felco's workers' compensation insurance.

¶6 Since approximately 1980, John Felton (Felton), Felco's president and owner, has hosted a company picnic at his lakeside home. Felco generally invites its employees and their families, friends, and vendors to the company picnic. In 2005, Felco rented wave runners for the annual picnic. While riding one of the wave runners, Michalak suffered serious injuries, including several vertebrae fractures, and he was unable to return to his employment with Felco.

¶7 Michalak filed a workers' compensation claim for his injury. Liberty denied Michalak's claim on the basis that the injury did not occur within the course and scope of his employment. Michalak then filed a claim with the WCC seeking compensation for his injuries.

¶8 The WCC issued findings of fact and conclusions of law after considering Michalak's trial testimony and the deposition testimony of Michalak, his co-workers, and other witnesses. The WCC found that Felco notified its employees of the 2005 picnic by placing a notice within the employees' pay stubs and by displaying notices within the plant. The WCC found that Felco paid for all the picnic supplies, including the wave runner rentals. The WCC found that Michalak had the duty of overseeing the wave runners during the picnic, and it found credible Michalak's testimony that he bore responsibility for supervising the wave runners' operation, including providing riders with safety instructions, monitoring the wave runners' fuel and oil levels, instructing others on how to ride the wave runners, and enforcing time limits on the wave runners' use. The WCC further found that, "during the performance of his duties," Michalak took a ride on one of the wave runners and was injured.

¶9 The WCC next applied the four "course and scope" factors set forth in *Courser v. Darby School Dist. No. 1* and concluded that Michalak was within the course and scope of his employment when he suffered his injury. 214 Mont. 13, 16-17, 692 P.2d 417, 419 (1984). Liberty appeals the WCC's holding and challenges both the WCC's findings of fact and its conclusions of law.

STANDARD OF REVIEW

¶10 We review the WCC's findings of fact to determine whether they are supported by substantial credible evidence, and we review the WCC's conclusions of law to determine whether they are correct. *Simms v. State Compensation Ins. Fund*, 2005 MT 175, ¶ 11, 327 Mont. 511, ¶ 11, 116 P.3d 773, ¶ 11. Substantial credible evidence to support a

finding of fact may be somewhat less than a preponderance of evidence but must be more than a mere scintilla. *Simms*, ¶ 11. We apply the Workers' Compensation Act (the Act) effective at the time an employee suffers an injury. *Wilson v. Liberty Mut. Fire Ins.*, 273 Mont. 313, 316, 903 P.2d 785, 787 (1995). The 2005 version of the Act governed when Michalak was injured on July 23, 2005.

DISCUSSION

¶11 **I Did the WCC err when it concluded that Michalak's injury occurred during the course and scope of his employment?**

¶12 Employees who receive an injury "arising out of and in the course of employment," are entitled to workers' compensation benefits. Section 39-71-407, MCA (2005). Liberty argues that § 39-71-118(2)(a), MCA (2005), removes Michalak from the definition of employee and therefore Michalak's injury is not compensable.

¶13 Section 39-71-118(2)(a), MCA (2005), defines "employee" and "worker" to exclude a person who is "participating in recreational activity and who at the time is relieved of and is not performing prescribed duties . . . ." Thus, a person injured while participating in recreational activities still qualifies as an "employee" and retains workers' compensation coverage if the person is injured while performing "prescribed duties." Section 39-71-118(2)(a), MCA (2005); *Connery v. Liberty Northwest Ins. Corp.*, 280 Mont. 115, 929 P.2d 222 (1996). *Courser*'s traditional four-factor "course and scope" analysis determines whether a person is "performing prescribed duties." *Connery*, 280 Mont. at 120, 929 P.2d at 225. The factors are: (1) whether the activity was undertaken at the employer's request; (2) whether the employer, directly or indirectly,

compelled the employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; and (4) whether the employer and the employee mutually benefited from the activity. *Connery*, 280 Mont. at 121, 929 P.2d at 226. Each factor's presence or absence "may or may not be determinative," and each factor's significance "must be considered in the totality of all attendant circumstances." *Connery*, 280 Mont. at 121, 929 P.2d at 226 (quoting *Courser*, 214 Mont. at 16-17, 692 P.2d at 419). After evaluating these factors, the WCC concluded that Michalak's injury was compensable because he had not been relieved of his "prescribed duties" and thus was acting within the course and scope of his employment. We review the WCC's findings of fact to determine whether they are supported by substantial credible evidence, and we review the WCC's conclusions of law to determine whether they are correct. *Simms*, ¶ 11.

¶14 Our review of the record supports the WCC's finding, under the first *Courser* factor, that the picnic was undertaken at Felco's request. Felton testified that the Felco company picnic had been an annual event since 1980. Felton testified that he selects the particular date of the picnic and that he and Felco pay the picnic expenses. Felton further testified that Felco provided paddle boats and wave runners because "it's common sense that people are going to more likely come if you have something like that . . . ." Denise Sand, Felco's secretary, testified that she notifies the employees about the picnic through notices placed around the plant and in the employees' paychecks. The notice that Sand distributed in 2005 requested a head-count and indicated that friends, family, and vendors were welcome at the Felco company picnic. Tim Yoder, a Felco supervisor

in charge of Felco's safety program, testified that he received a picnic invitation in his paycheck. Michalak also testified that he received an invitation in his paycheck.

¶15 Regarding the second *Courser* factor, the WCC found that "at a minimum, Felco indirectly compelled [Michalak's] attendance at the picnic." The WCC stated that Michalak felt compelled to attend the picnic because his supervisor had asked him to oversee the wave runners. Steve Talley, Michalak's supervisor, testified that he felt responsible for instructing the picnic attendees on safety procedures relating to the wave runners. Talley testified that he asked Michalak to assist with and watch over the wave runners because Talley knew that he would be unable to continuously supervise the wave runners. Talley testified that Michalak agreed to provide assistance. Michalak testified that Talley asked him to oversee the wave runners at the picnic. Michalak indicated that he understood Talley's request to be made in his capacity as Felco's foreman, not as a personal favor to Talley. Michalak testified that he went to the office of Fish, Wildlife, and Parks and at some point obtained and reviewed a copy of the Montana boating regulations. Michalak testified that one of his daughters felt ill on the morning of the picnic, and he thought he would be unable to attend. Her condition soon improved, however, and Michalak testified that he and his family went to the picnic so that he could fulfill his obligation and respect his employer. We conclude that substantial credible evidence supports the WCC's finding that Felco compelled Michalak's attendance at the company picnic.

¶16 As to the third *Courser* factor, the WCC found that Felco controlled and participated in the picnic activities. Felton testified that he selects the date of the picnic

and that he and Felco pay for the picnic expenses, including food, beverages, paddleboats, and wave runners. He further testified that Felco provides everything and has a policy against employees bringing items to the picnic. Felton testified that he hosts the company picnic at his home on Flathead Lake. Felton further testified that he believed Felco took a tax deduction for the picnic expenses. Shawn Skinner, Felco's general manager, testified that he had duties and responsibilities related to organizing the picnic, but primarily delegated the tasks associated with organizing the picnic to Ken Lockwood, an independent contractor, and Denise Sand. Sand testified that she used a Felco company credit card to purchase the picnic supplies, including the wave runner rentals. Sand further testified that Felco claimed the picnic expenses as a tax deduction. Several witnesses also testified that the annual company picnic features a horseshoe tournament, with the winner earning a spot on a plaque displayed at Felco. We conclude that substantial credible evidence supports the WCC's finding that Felco controlled or participated in the picnic.

¶17 Finally, the WCC found that Felco and its employees mutually benefited from the picnic. Felton testified that the company picnics were good for the company and that the picnic promoted good relations. Tim Yoder testified that the picnic was good for the company and good for morale. Skinner testified that the company picnic benefited Felco and Felco's employees. Sand testified that the picnic was good for the company because the picnic provides an opportunity for the employees to congregate with their spouses and extended family. We conclude that substantial credible evidence supports the WCC's

finding, under the fourth *Courser* factor, that the Felco company picnic provided mutual benefit to Felco and its employees.

¶18 Liberty's argument that Michalak failed to satisfy the *Courser* factors rests on the misconception that the "activity" in the *Courser* analysis should be Michalak's wave runner ride, rather than the Felco company picnic. However, Liberty's narrow focus on Michalak's wave runner ride is inconsistent with *Courser* itself. In *Courser*, we determined that Courser was within the course and scope of his employment when he was injured in a motorcycle accident while commuting from graduate school to his home in Dillon, Montana. We applied the four-factor "course and scope" analysis and focused on the activity of attending graduate school, not the motorcycle ride. 214 Mont. at 16-17, 692 P.2d at 419. The WCC properly focused its *Courser* analysis on the Felco company picnic as the "activity," rather than Michalak's ride on the wave runner, to determine whether Michalak's injury occurred within the course and scope of his employment.

¶19 We conclude that substantial credible evidence supports the WCC's findings under the *Courser* factors. Based on its *Courser* analysis, the WCC determined that, though Michalak was injured while participating in a recreational activity, he nonetheless was within the course and scope of his employment when he was injured and that his injury was compensable. We conclude that the WCC's findings support its conclusion of law that Michalak was injured within the course and scope of his employment.

¶20 Liberty argues that the above four-factor analysis has no place in Montana's jurisprudence and advocates that we overrule *Courser*. According to Liberty, the *Courser* factors trace their ancestry to the "liberal construction" statute, § 39-71-104,

MCA (1985), and, because the Legislature has repealed that statute, the factors should be excised from our jurisprudence. Additionally, Liberty describes this Court's *Connery* decision, in which we concluded that the "prescribed duties" of § 39-71-118(2)(a), MCA, are determined by applying the *Courser* factors, as "simply a judicial abracadabra." We disagree with Liberty on both counts. First, the *Courser* factors set forth *what* a court should analyze to determine whether a person's injury falls within the course and scope of employment; the Legislature's directive that the Act be construed according to its terms and not liberally in favor of any party instructs a court *how* to interpret the Act. Section 39-71-105, MCA (2005). The *Courser* factors and the Legislature's directive are not mutually exclusive and we decline Liberty's plea to overrule *Courser* and its successive body of case law. Second, as to the "judicial abracadabra" charge, we explained in *Connery* that the Legislature left the term "prescribed duties" undefined and we noted that defining prescribed duties is fact-intensive and varies depending on the particular case. Thus, we concluded that "the application of a traditional course and scope of employment analysis is, and will be, necessary to determine exactly what an employee's 'prescribed duties' are in a particular case." 280 Mont. at 120, 929 P.2d at 225. In the eleven years since *Connery*, the Legislature has declined to modify or further define the term "prescribed duties." Absent further legislative direction, we reject Liberty's plea to overrule *Courser*, *Connery*, and the ensuing cases applying the "course and scope" factors. We conclude that the WCC applied the correct analysis to determine whether Michalak's injuries were compensable.

¶21 **II Did Michalak abandon his employment by participating in reckless behavior?**

¶22 Liberty argues that Michalak abandoned his employment by operating the wave runner in a reckless manner. According to Liberty, the only way Michalak could have sustained his severe injuries is by operating the wave runner at a high rate of speed and in a dangerous manner. In support of its argument, Liberty cites to *Hicks v. Glacier Park, Inc.*, 236 Mont. 113, 768 P.2d 346 (1989).

¶23 In *Hicks*, a Glacier National Park bellhop, who fancied himself an auto-mechanic, attempted to assist a guest with a weak car battery. The bellhop first push-started the car, then accelerated to a high rate of speed, failed to stop at a stop sign, and eluded a pursuing park ranger by putting "the pedal to the metal." The bellhop eventually lost control of the vehicle and crashed into a tree approximately two-and-a-half miles from the hotel. 236 Mont. at 114, 768 P.2d at 347. The WCC found that even if the bellhop was initially within the course and scope of his employment, he deviated from the scope of his employment when he evaded the law enforcement officer. We affirmed the WCC's judgment denying compensation to the bellhop. *Hicks*, 236 Mont. at 117, 768 P.2d at 348.

¶24 Liberty argues that, like the bellhop in *Hicks*, Michalak abandoned the course and scope of his employment when he operated the wave runner recklessly and at high speed and thus "pursue[d] an objective in nowise essential to or incidental to any service he is paid to perform . . . ." *Hicks*, 236 Mont. at 115, 768 P.2d at 347 (emphasis omitted). *Hicks* is inapplicable to this case. Unlike *Hicks*, the WCC in this case made no findings

that Michalak acted recklessly or negligently. In fact, the WCC made no findings regarding the manner in which Michalak operated the wave runner other than finding that he was injured during the performance of his duties:

> [Michalak] testified that he was instructed to help pick up the wave runners, supervise, give safety instructions, monitor the fuel and oil levels, provide instructions on how to ride them, and enforce time limits on their operation. At one point, during the performance of his duties, [Michalak] elected to take a turn on one of the wave runners himself because one was available.
>
> While riding one of the wave runners, [Michalak] sustained the injuries that are the subject of this action. [Michalak's] recollection as to the specifics of how he was injured is vague because of his injuries.

¶25 Though Liberty acknowledges that Michalak provided some assistance before taking a ride on the wave runner, Liberty claims that testimony from Michalak and Talley supports finding both that Michalak was operating the wave runner in a reckless manner and that he was untrustworthy as a witness. Michalak testified that as he executed a subtle left-hand turn, he saw "something very weird in the water, and that is the last thing I remember." Michalak testified that he regained consciousness underwater and that he had to blow bubbles to determine the direction of the surface. He stated that when he gained the surface of the lake, the wave runner was "quite a distance" from him. Talley testified that Michalak told him that "he was out there flipping the Wave Runner around" when he was injured. Based on this testimony, Liberty urges that the only possible explanation for Michalak's injury is that "he was traveling at a very high rate of speed when he lost control of the wave runner and was plunged deep into Flathead Lake."

¶26 In essence, Liberty calls on this Court to make additional findings of fact regarding Michalak's injury. Liberty states that "it is conclusively established by the [un-

contradicted] testimony of Talley that [Michalak] injured himself while whipping the wave runner around at a high speed." However, Talley's testimony is contradicted: Michalak testified that he was not "wave-jumping" when he was injured, but that he was making a subtle left-hand turn and saw a discoloration in the water. Other witnesses testified that they saw logs floating in the lake in 2005. Further, the WCC determined that Michalak was a credible witness. The WCC also found that Michalak was injured during the performance of his duties; we concluded under Issue I that substantial credible evidence supported the WCC's *Courser* analysis and that the WCC correctly concluded that Michalak's injury occurred during the course and scope of his employment. Our standard is whether substantial credible evidence supports the WCC's findings, not whether evidence supports findings different from those made by the WCC. *Taylor v. State Compensation Ins. Fund*, 275 Mont. 432, 440, 913 P.2d 1242, 1246 (1996). In this case, the WCC's findings are supported by substantial credible evidence; moreover, we refuse to substitute our judgment for that of the WCC's when the issue "relates to the weight given to certain evidence or the credibility of the witnesses." *Taylor*, 275 Mont. at 437, 913 P.2d at 1245.

CONCLUSION

¶27 We conclude that the WCC properly applied the four factors from *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 692 P.2d 417 (1984), to determine whether Michalak's injury while riding a wave runner at the Felco company picnic occurred during the course and scope of his employment. We conclude that substantial credible evidence exists to support the WCC's findings under the *Courser* factors and that the

WCC correctly concluded that Michalak was injured during the course and scope of his employment. We affirm.

/S/ W. WILLIAM LEAPHART

We concur:

/S/ JOHN WARNER
/S/ JAMES C. NELSON
/S/ PATRICIA COTTER
/S/ BRIAN MORRIS